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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1223

CALDERONE ENTERPRISES CORPORATION,

Petitioner,

against

UNITED ARTISTS THEATRE CIRCUIT, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR EXHIBITOR-RESPONDENTS IN OPPOSITION

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Statement

Petitioner seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals, for the Second Circuit entered December 28, 1971 (61a)* which judgment affirmed an order of the United States District Court for the Southern District of New York, entered May 24, 1971, dismissing petitioner's Complaint (23a). This brief is submitted on behalf of respondents United Artists Theatre Circuit, Inc., Metropolitan Playhouses, Inc. ("Metropolitan") and United Artists Eastern Theatres, Inc. (herein-

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* All "a" references are to pages of petitioner's appendix.

after collectively referred to either as "Exhibitor-Respondents" or "UATC").*

UATC is in the business of exhibiting motion pictures. During the period covered by the Complaint UATC leased certain theatres from petitioner and operated those theatres (5a-13a).

In addition to UATC, the Complaint named as defendants seven firms who produce and distribute motion pictures (hereafter "distributor-respondents"). It purported to invoke the federal question jurisdiction of the District Court by asserting three causes of action against UATC and each of the distributor-respondents for treble damages under Section 4 of the Clayton Act (1a-17a). It also asserted three causes of action solely against UATC. These last three causes of action were for alleged breach of lease and jurisdiction was predicated on the principles of pendent jurisdiction (12a-17a).

UATC served and filed an answer to the Complaint denying petitioner's essential allegations. In that answer respondent Metropolitan interposed a counterclaim against petitioner. That counterclaim alleged that Metropolitan, for the period October 31, 1961 through August 31, 1969, paid to petitioner rentals exceeding $2,500,000 for the three theatres which are the subject of the Complaint plus an additional theatre on Long Island; that during this period, UATC suffered losses in excess of $1,000,000 in operating these theatres; that petitioner knew the theatre leases were to expire on May 7, 1971 after twenty-four years and that UATC would not in view of its losses renew those leases; and that petitioner, refusing to accept UATC's unquestioned right not to renew, embarked on a course of conduct—which culminated in the commencement of the instant anti trust suit—seeking to coerce UATC to renew

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* United Artists Eastern Theatres, Inc. and Metropolitan Playhouses, Inc. are subsidiaries of United Artists Theatre Circuit, Inc.

the leases on onerous and unsound terms, or, alternatively, to force UATC to purchase petitioner's fee interest at an unconscionable price. Metropolitan's counterclaim alleged that petitioner's actions materially and maliciously breached the express covenants of the leases as well as the implied covenants of good faith which require that a landlord not commit acts which seek to injure or otherwise destroy the right of a tenant to receive the benefits of a lease.

Following the service of the Summons and Complaint, distributor-respondents moved to dismiss petitioner's first three causes of action on the ground that petitioner had no standing to sue for treble damages under the Clayton Act (18a-20a). UATC made a separate motion to dismiss those counts on that same ground. In addition, UATC moved to dismiss the last three causes of action on the ground that the law requires that if federally-based claims are dismissed prior to trial, the pendent "state" claims should also be dismissed (21a-22a). *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966).

On May 24, 1971, the District Court dismissed all six purported causes of action (23a-27a) and petitioner took an appeal.

On the appeal to the United States Court of Appeals for the Second Circuit, petitioner did not take issue with the District Court's dismissal of the last three causes of action. It raised only the single issue of whether, under the Clayton Act, it had standing to bring the first three causes of action. It therefore in effect acknowledged that if it had no such standing, its last three causes of action may not proceed in federal court.

On December 28, 1971 the United States Court of Appeals for the Second Circuit affirmed the order of the District Court dismissing the Complaint.

On the single issue which petitioner seeks to raise in this Court, the law is clear, as the brief in opposition of dis-

tributor-respondents demonstrates, that petitioner, as a non-operating theatre landlord, has no standing to assert the alleged antitrust claims made below and there is no substantial conflict among the circuit courts on this question which requires resolution by this Court. Nor, as is also shown therein, is there any reason based on policy or otherwise for this Court—after refusing to grant certiorari in other actions in which requests were made on much the same bases as set forth in the instant petition—to grant the writ in the case at bar. To avoid unnecessary repetition with respect to the single issue raised by petitioner in its petition, UATC fully adopts the presentation made to this Court by the distributor-respondents in their brief in opposition and respectfully refers this Court to that presentation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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